No. 87-1167

In the Supreme Court of the United States

OCTOBER TERM, 1988

PRICE WATERHOUSE, PETITIONER

v.

ANN B. HOPKINS, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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What was the "true reason" for Price Waterhouse's decision to place Ann Hopkins' partnership candidacy on "hold"? Was it "*because* of [her] * * * sex," and thus in violation of Section 703(a)(1) of Title VII? That is, ultimately, the sole issue in this case.

Respondent and her amici seek to obscure the character of this issue, first, by giving misleading accounts of the facts and findings in this case, and, then, by bringing forward a confusing storm of new, distracting, and contradictory legal theories, all of them either wrong or inapposite to this case.

I.

A. Respondent attempts to picture this case as one where a brilliant employee, obviously entitled to partnership by all "objective" criteria, was in effect vetoed—"blocked"—by the sexist negative comments of a few partners who knew little of her or her work and whose opinions therefore clearly were based on discriminatory motives.

This is a false picture, completely at odds with the findings of the district court and with the undisputed

facts.[1] Hopkins' promotion was in no way "blocked" or "thwarted" by the negative views of a few partners who did not know her work and who submitted sexist reports. In fact, this entire picture of a "veto" system at Price Waterhouse is false. The decisionmaking process at Price Waterhouse involved an extensive evaluation by both the Admissions Committee and the Policy Board of Hopkins' *entire* record at the Firm, based on all available information. This included not only all of the written responses to the partnership "survey" about Hopkins' candidacy, but prior evaluations of her work and interviews with partners about the bases for their views of Hopkins. The totality of this information provided massive support for the district court's conclusion that Hopkins' "*conduct provided ample justification for the complaints that formed the basis of the Policy Board's decision*" (Pet. App. 46a-47a) (emphasis added). That information included facts—and misgivings based on those facts—furnished in long form reports by many of Hopkins' *supporters*. (Thus it was Thomas Beyer, Hopkins' chief sponsor, who wrote that Hopkins would "lose sensitivity for staff" (Def. Ex. 27), and who testified that he had already warned Hopkins that her harsh and unseemly behavior would jeopardize her partnership possibilities (see Pet. Br. 8).[2]

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[1] Respondent's "colorization" of the facts is considerably abetted by her practice of imputing to the district court "findings" that the district court did not find. Thus, respondent says (Br. 7-8), "the district court accepted Hopkins' central argument: 'that she was not evaluated as a manager, but as a woman manager, based on a sexual stereotype that prompts [some] males to regard assertive behavior in women as being more offensive and intolerable than comparable behavior in men because some men do not regard it as appropriate feminine behavior' (Pet. App. 51a)." A glance at the cited portion of the district court's opinion will show, however, that the court was simply describing *Hopkins'* claims ("[*s*]*he claims* that she was not evaluated . . . [etc.]") (emphasis added) and not making findings at all.

[2] Another early supporter reported that Hopkins "can be abrasive, unduly harsh, difficult to work with &, as a result, causes significant

The information about Hopkins' character and performance furnished in the long form reports was entirely consistent with and confirmed the information derived from the short form reports and from the previous evaluations of Hopkins' work. It was not the views of a few ill-informed outsiders, but the *consensus* view, that there existed major shortcomings in Hopkins' ability to deal with co-workers and subordinates; it was this consensus that resulted in the fact that a detailed statistical profile derived from *all* the evaluations submitted by partners gave Hopkins low overall ratings for "tolerance," "sensitivity," "tact," "leadership," and "congeniality" (Def. Ex. 27; see Connor Dep. 31-33).[3] Indeed, evaluations by both the long and short form commenters, when summarized by the Admissions Committee in the statistical profile, showed that Hopkins ranked *second to last* of all candidates in her class in "personal attributes." Def. Ex. 35, 36.

Under these circumstances, it would not have been surprising had the Policy Board voted to reject Hopkins outright. Her candidacy was placed on hold only because the Chairman and Senior Partner of the Firm, Joseph Connor, decided "that [he] would push in the Policy

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turmoil" (Def. Ex. 27, Epelbaum). Other partners who had worked very closely with Hopkins noted that staff disliked working for her (*ibid.*, Statland and Coffey) and that she was "just plain rough on people" (*ibid.*, Coffey).

[3] We remind the Court that of the 32 partners who submitted evaluations of Hopkins, only 13 thought she should be made a partner. Eleven thought she should be rejected or held, and eight made no recommendation. Def. Ex. 27. We also note that of the 13 partners who recommended that Hopkins be admitted to the partnership, ten were short form commenters, while only three of the six partners who completed long form evaluations recommended her for partnership. Hopkins' suggestion (Br. 4-5) that her candidacy was "blocked" by the recommendations of the short form commenters is thus belied by the record; as Beyer, Hopkins' strongest supporter, testified, "[i]t's generally accepted in the firm that you need five, six favorable long form votes to be even seriously considered at the Admissions Committee level." Tr. 173.

Board's discussions for a hold and give her a chance to see if she could work on [interpersonal skills] and overcome some of these impediments" (Connor Dep. 30). Connor further testified that he "had some real trouble with the Policy Board because the record clearly justified a no." *Ibid.*

Respondent also conveys a distorted picture of the short form reports. These reports were filled out, not by partners who "barely knew" Hopkins (Resp. Br. 29) but by partners who had *"less than full time involvement"* with her (Connor Dep. 62).[4] Nor were these reports limited to conclusory (and supposedly sexist) adjectives ("hard-driving"; "aggressive"; "abrasive" (NOW Br. 6; Resp. Br. 9)); they were filled with specific information about the facts of Hopkins' inability to deal with staff. Partners noted that Hopkins "tended to alienate the staff in that she was extremely overbearing" toward them (Def. Ex. 27, Green), and that she lacked "leadership qualities" (*ibid.*, Wheaton) and might be unable "to develop & motivate [Price Waterhouse's] staff as a [partner]" (*ibid.*, Fridley). Others reported that staff and peer reaction to Hopkins was "uniformly *negative*" (*ibid.*, Docter), and that she was "universally disliked by the staff" (*ibid.*, Everett).

The fact is that the short form and long form reports, as well as the other evidence available to the Admissions Committee and the Policy Board—derived from Hopkins' supporters, opponents, and neutrals[5]—add up to a remarkable congruity of opinion. Hopkins was an able and talented businesswoman,[6] whose performance at Price Waterhouse nevertheless was persistently marred by shortcomings in her ability to deal with co-workers (particularly subordinates). That is why the district court found that both "[s]upporters and opponents of her candidacy indicated that [Hopkins] was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff" (Pet. App. 43a-44a). Given these circumstances, and given the nature of the partnership relationship, it was eminently reasonable and responsible for the Policy Board to conclude that she should not be proposed for admission to the partnership at that time.

B. Even more unfair is respondent's persistent innuendo that the record shows that *opponents* of Hopkins' candidacy couched their opposition in terms that the district court found to be sexist, so that the "evidence" of "stereotyping" in this case related to the very persons in the firm who supposedly "blocked" her candidacy.

But as Judge Williams' dissent demonstrates in detail (see Pet. App. 29a-36a), all except *one* of the comments that could in the faintest way be characterized as overtly sexist (*e.g.*, "a lady using foul language"; "macho"; "matured from a tough-talking, somewhat masculine hard-nosed mgr. to an authoritative, formidable, but much more appealing lady partner candidate") were made by partners who *supported* Hopkins' candidacy. (The one exception is the remark that Hopkins should take a

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[4] "Full-time involvement" with Hopkins by the relevant *partner* was of course not essential for reaching an informed view about Hopkins' staff relations. Managers and staff, many of whom had *extensive* dealings with Hopkins, would naturally report their problems with Hopkins to partners (see, *e.g.*, Def. Ex. 27, Docter, reporting the "uniformly negative" input of "3-5 MAS [senior managers] who have worked with [Hopkins] extensively").

[5] The reports from partners who acknowledged that they did not have sufficient information to make an ultimate judgment about Hopkins' candidacy were also full of comments about the fact that she was "weak in interpersonal skills" (Def. Ex. 27, Johnson), "arrogan[t] & self-centered" (*ibid.*, Haller), and "extremely overbearing" (*ibid.*, Green).

[6] Though Price Waterhouse did indeed assign Hopkins the task of drafting proposals that brought new work to the Firm, the suggestion that she singlehandedly captured $30 to $40 million in new business (NOW Br. 5) is silly. The massive proposals that generated these revenues were typically prepared over months and years by elaborate teams of Price Waterhouse managers and partners; as Hopkins herself testified, while she had been a contributor to successful proposals for new work, "[t]he entire team of people on all of the efforts that I worked on were [also] contributors" (Tr. 135).

"course at charm school," which was a passing phrase in a thoughtful comment opposing her candidacy; its weight as evidence of sexual discrimination is adequately disposed of by Judge Williams (see Pet. Br. 16 & n.4).)

There is, in sum, not a jot or tittle of support, either in the record or in the district court's findings, for respondent's claim that her candidacy was simply "blocked" by opponents who, although unfamiliar with her work, made negative recommendations on the basis of judgments that were shown to have been based on sexist stereotypes.

C. It is, of course, the case that Hopkins frequently was characterized by both opponents and supporters as aggressive, harsh, insensitive, and overbearing. It is the use of these general adjectives, in no way overtly sexist, that is seen by some of respondent's amici as reflecting the existence of sexual stereotyping at Price Waterhouse. But of course this creates a problem: what language *is* it permissible to use to describe a woman who *is in fact* aggressive, harsh, insensitive, and overbearing? If there exists a fair basis for concluding that there are *facts* to support these adjectives, should their mere use be denounced as a violation of Title VII—*without inquiry into the facts?*

With this question, we reach the problem of Dr. Fiske's testimony and its role in this case. Respondent's amici tilt with a straw man when they explain at great length that sexual stereotyping can and does exist and can and does lead to discrimination against women.[7] Of course that is the case. Nor do we doubt that good social science

[7] Hopkins and her amici rely on some of this Court's decisions condemning disparate treatment resulting from sex stereotypes (*e.g.*, Resp. Br. 30, 46-47; NOW Br. 31-33). These cases involved facially discriminatory policies that were the product of stereotyped notions of the differences between men and women. See, *e.g.*, *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 729 (1982) ("excluding males from [nursing school] tends to perpetuate the stereotyped view of nursing as an exclusively woman's job").

can help untangle difficult factual perplexities in discrimination cases.

The question here is the *particular* one, whether Dr. Fiske's *particular* testimony—which constituted a critical element in the district court's conclusion that Title VII was violated by unlawful "motivation" on the part of Price Waterhouse—was reasonably probative of that proposition—that is, whether it *was* valid social science to use Dr. Fiske's reasoning process as evidence of the fact that sexual discrimination tainted Price Waterhouse's decision *in this case.*

Our central submission is simple: it was illegitimate —and bad social science—for Dr. Fiske to conclude, and for the district court to accept Dr. Fiske's conclusion, that a discriminatory motive was shown to have existed in *this case* simply because words were used to characterize Hopkins that have been shown *in statistical samplings of other situations* to be associated with sexism.[8]

[8] This Court cannot be the arbiter of what is valid social science. But, in light of the claims made in some of the amicus briefs (particularly the brief of the American Psychological Association (APA)), we point out that Dr. Fiske's testimony in this case violated elementary principles of adequate methodology. See generally T. Cook & D. Campbell, *Quasi-Experimentation: Design & Analysis Issues for Field Settings* 37-95 (1979).

First, Dr. Fiske should have tested the "fit" of the terms used to describe Hopkins with the subject of analysis. See Cook & Campbell at 86. Dr. Fiske could have tested this fit either by asking former employees, co-workers, friends, and acquaintances to fill out evaluation forms similar to those used in the Price Waterhouse partnership selection process, or by actually interviewing Hopkins.

Second, when Dr. Fiske examined the records of other partnership candidates (J.A. 44), she should have conducted blind comparisons of those records with Hopkins' record in order to determine whether the terms used to describe Hopkins' interpersonal skills differed substantially from the terms used to describe the other candidates. See Cook & Campbell at 87. Had Dr. Fiske made these comparisons, she might well have come upon the evidence showing that interpersonal skills were a key consideration in the case of numerous male partnership candidates whom the firm decided to reject or to hold. See, *e.g.*, Def. Ex. 64, Tab 5 (male candidate rejected because he "ranks relatively low among candidates in a

Simply put, " 'a study must rule out, or control for, competing hypotheses that may account for an observed state of affairs.' " (APA Br. 6 (citation omitted)). Dr. Fiske's egregious error was her failure to rule out the possibility that Hopkins was indeed "abrasive," "aggressive," and "overbearing."

If Dr. Fiske's analysis is permitted to establish Title VII liability, no employer can deny a partnership to any woman with a harsh, overbearing, and insensitive per-

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number of attributes including administration, communications, judgment, tact, congeniality and acceptance by associates/partners"; "[h]e has been described as boisterous, lacking in social tact and judgment, continually complaining, loud and abrasive, overbearing, opinionated"); *id.* at Tab 6 (male candidate placed on hold because short form evaluations characterized him as " 'not outgoing,' 'officious,' 'overbearing' "); *id.* at Tab 9 (male candidate placed on hold in part because he "is very aggressive and tough on staff"); *id.* at Tab 10 (male candidate rejected because "[h]is ability to deal with partners and staff is seriously impaired by personality attributes which are described as negative and abrasive"); *id.* at Tab 11 (rejected male candidate characterized as "immature, overbearing, gossipy and highly political in his business conduct"); *id.* at Tab 17 (male candidate placed on hold because he "has a tremendous ego and sometimes appears to be abrasive and brash").

Third, Dr. Fiske made no attempt to test the question whether Price Waterhouse partners "matched" the samples employed in other sex stereotyping research. See Cook & Campbell at 42.

Cook and Campbell (the latter a past president of the American Psychological Association) are widely regarded as experts in the field of research design and the conduct of randomized experiments in field settings. See Glass & Asher, *Causation and Quasi-Experimental Design*, 25 Contemp. Psychology 772, 773 (1980). *Quasi-Experimentation* is about "drawing causal inferences in field research." Glass & Asher at 774. The validity chapter is renowned for its "contribution to the methodology of the social sciences that is deep and penetrating; it is absolutely essential for advancing further our thinking on the methodology of empirical research." *Id.* at 775. Scholars claim that Cook and Campbell's work on analyzing research designs "gives all researchers a powerful language for assessing the strengths and weaknesses of their own research. Research professionals could hardly ask for much more in a single volume." Hennessy, *The End of Methodology? A Review Essay on Evaluation Research Methods*, 35 W. Pol. Q. 606, 609 (1982).

sonality. For, as Judge Williams suggested, "no woman could *be* overbearing, arrogant or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping." Pet. App. 36a (Williams, J., dissenting) (emphasis in original).

D. We add a word about the so-called "smoking gun" —Thomas Beyer's remark, made *after* Hopkins' partnership was placed on hold, that in his opinion she should act more femininely. Respondent places heavy reliance on the remark. Resp. Br. 8, 43-44. More astonishingly, the Solicitor General asserts that this remark, by itself, permissibly may serve as the basis of a future finding by the district court that the decision to postpone Hopkins' partnership bid "was caused" by an unlawful motive. U.S. Br. 27.

Beyer made this remark to Hopkins *after* the Policy Board accepted the Admissions Committee's recommendation to place Hopkins' candidacy on hold. Beyer himself was, of course, not a member of either group. He was Hopkins' strongest (and, therefore, obviously most disappointed) supporter. Can his inept post-hoc remark about how his protégé should behave in the future serve as *sufficient* evidence to support the conclusion that the *Policy Board*'s past decision was in fact tainted by discriminatory motives?

We suggest that the answer must be "no." The reasons for the Policy Board's decision were communicated to Hopkins by the Firm's Chairman and Senior Partner at a meeting explicitly and especially dedicated to a discussion of the partnership decision and Hopkins' future prospects (Tr. 87-95, 167; Connor Dep. 37-38, 53-62). Hopkins testified that none of the reasons mentioned at that meeting had anything to do with her sex (Tr. 95).

In light of this, the notion that Beyer had the "responsibility" for telling Hopkins why her candidacy had been postponed is simply an invention (and, as Judge Williams said below (Pet. App. 31a-32a), the district court's casual aside to that effect (*id.* at 52a) was unsupported by

any breath of evidence). But in any event, to take Beyer's advice to Hopkins as itself constituting sufficient evidence that the members of the two relevant committees had *in fact* been motivated by illegal and obnoxious motives—in the face of overwhelming evidence that they had before them ample legitimate reasons to have misgivings about Hopkins' candidacy—would be unfair and misguided.

The Solicitor General's submission that the Beyer remark could by itself "support" a finding that the decision to put Hopkins on hold was "caused" by a discriminatory motive is an egregious example of the practice this Court rejected in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951), when it stated that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." The law requires that there be "record evidence which provides a rational or logical basis for the finding and for the consequent presumption that the finding was in fact the product of reasoning from evidence. This must mean evidence *in the case* and *in the context of the case.*" Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1027 (1956) (emphasis in original). So in this case. To base a finding on a single item of evidence torn from the context of the case "is to imagine an abstract case, a case that was never tried." *Ibid.* Where the record presents undisputed and indisputable evidence that there existed a bona fide, nondiscriminatory basis for an employment decision, it is wholly illegitimate and unfair to suggest that that evidence should simply be overridden by an isolated incident consisting of an after-the-fact remark by Hopkins' mentor (himself not a decisionmaker) that—only by implication—attributes to the responsible actors a willingness to be influenced by impermissible and deplorable motives.

II.

Perhaps the most remarkable aspect of the briefs submitted by respondent and her amici in this case is the speed and unanimity with which virtually everyone on

the scene has abandoned the court of appeals. Apparently it is now conceded on all sides (see, *e.g.*, Resp. Br. 35 n.20) that the court of appeals erred when it held that the burden of persuasion on the issue of liability shifts to the defendant in so-called "mixed motives" cases.[9]

Respondent and her amici attempt to salvage something from this admission of defeat by injecting into this case, at the eleventh hour, a confusing welter of new legal theories. But there is one unifying theme that underlies all of these theories: they are all designed to dilute—indeed, virtually to eliminate—the requirement that, in order for Hopkins to win her case, it must be found that she did not become a partner *because* of intentional discrimination. Causation has always been the key issue of fact in this case, and now respondent and her amici make it the key issue of law as well.

A. Having conceded that the court of appeals was in error in shifting the burden of persuasion to the defendant on the issue of liability, respondent and her amici defend the court of appeals' judgment by proposing a theory of liability for this case that would drain this concession of all significance. Specifically, they propose that Hopkins' burden consists, not of showing that her failure to be promoted was *caused* by unlawful discrimination, but merely of showing that the challenged employment decision was in some way "affected" by stereotypes.

What does it *mean*, that a decision was "affected" by—even though not caused by—discriminatory motives? This remains a mystery wrapped in an enigma. Its solution is not helped by the fact that respondent and her amici present divergent formulations as to how significant a "factor" discrimination must be.[10] Nor is it helped

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[9] In a submission of profound obscurity, respondent argues (Br. 35 n.20) that the court of appeals' error in shifting the burden of proof to Price Waterhouse constituted a benefit to Price Waterhouse. We are unable to follow her reasoning.

[10] Hopkins and her amici use different definitions, agreeing only on the proposition that, whatever the label used, very little indeed

by respondent's explicit avowal (Br. 28) that the matter is not susceptible to "precise" formulation. In the end, respondent is forced to rest (Br. 29) with the district court's unhelpful formula: Title VII was violated because stereotyping supposedly played "an undefined role" in blocking Hopkins' admission to partnership.[11]

As we demonstrated in our opening brief, the language and legislative history of Title VII make it quite clear that, in an individual Title VII case involving disparate treatment, causation in fact is a necessary element of Title VII liability. To use the Solicitor General's words, causation is shown only if the discriminatory motive "was a *necessary* element in any set of factors that together was sufficient to produce the outcome" (U.S. Br. 13) (emphasis added).[12] Respondent and her amici ap-

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need be shown before an employer may be adjudged a "proven wrongdoer" and hence found to have violated Title VII. See, *e.g.*, Resp. Br. 31 (plaintiff's burden is merely to prove that "discrimination, affected an employment decision"); NOW Br. 36-37 (plaintiff need prove only that "sex is * * * *a* factor in the employment decision") (emphasis in original); City Bar Br. 11 (liability is established if the plaintiff proves that the employment decision was "tainted by evaluations incorporating disappointed sex-role assumptions"); AFL-CIO Br. 26 (plaintiff need prove only "that sex * * * played a negative role in the decisionmaking process concerning a term, condition, or privilege of employment").

[11] Of course respondent insists (Br. 29) that she is not talking about discrimination "in the air." But what exactly does it mean to say that unconscious sex stereotyping played an "unquantifiable" and "undefined" *role* in a decision that would, by hypothesis, have been the *same* even in the absence of stereotyping? If the discriminatory thoughts and feelings supposedly held by some Price Waterhouse partners in fact made no difference to the decision that was made, is it not, precisely, the mere existence of those thoughts and feelings that is made actionable?

[12] We hope that the Court will not follow the Solicitor General's further excursion (U.S. Br. 11-15) into the labyrinthine mysteries of causation at common law, and adopt his special (and not easily understood) gloss on causation that distinguishes between "but for" cause on the one hand and "sufficient" cause on the other.

The Solicitor General's category of "sufficient" cause was developed to deal with very specific and unusual tort problems. It is

parently concede that Hopkins has not made and cannot make this showing. But they come forward with no reason why this requirement—so plainly in the forefront of the minds of the eminently pragmatic lawyers who framed Title VII and so utterly conventional in the law—should be abandoned.[13]

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manifestly out of place in the Title VII context. It covers the few bizarre cases where an event is produced by two physical causes each sufficient to produce a result (X shoots Y at the instant that Y is hit by lightning). Beyond this, the "sufficiency" standard is applied in cases involving *multiple, tortious* actions, each sufficient by itself to have caused the harm complained of, and none of which can be ruled out as the cause of the injury. See H.L.A. Hart & T. Honore, *Causation in the Law* 123-124 (2d ed. 1985); W. Prosser, *Law of Torts* 239 (4th ed. 1971). The plaintiff cannot prove in such a case that he would not have been injured "but for" the tortious conduct of any particular defendant. Hence some courts allow the plaintiff to prove liability in these circumstances merely by showing that the defendant's tortious actions were "sufficient" to have caused his injury. The policy behind this modification of the "but for" test is clear: When the wrongful act of each of two defendants is sufficient by itself to cause a plaintiff's harm, it is unfair to allow both defendants to escape liability simply because both did something that alone would have produced the harm. See W. Prosser, *supra*, at 239.

But this policy has no application whatever in the Title VII context. Transposed to so-called "mixed motives" Title VII cases, the "sufficiency" standard of causation would not ensure, as it does in its tort context, that an innocent plaintiff may recover from among various wrongdoers for his loss. Instead, it would operate to single out an illicit motive as a ground for liability for an employment decision that was perfectly *legitimate*. It thus would allow a Title VII plaintiff to succeed though she has suffered *no* harm at all as a result of discrimination—because her employer would have reached precisely the same decision for nondiscriminatory reasons.

[13] Respondent and her amici certainly win the prize for the biggest red herring of the year by arguing that Congress's intention to create Title VII liability without a showing of "but for" causation is demonstrated by its rejection of a statutory formula that would have restricted liability to cases where discrimination was the *only* or *sole* reason for an employment decision. *E.g.*, Resp. Br. 21; NOW Br. 42-43 & n.36. In fact, Price Waterhouse has never argued that Title VII liability requires such a showing. The "sole motive" issue is, in other words, a non-issue.

Substitution of any of the diluted formulae proposed by Hopkins and her amici for a requirement of causation in fact would invite a lawsuit for every errant manager's discriminatory thoughts or comments, regardless of whether those thoughts or comments (or, indeed, the manager) made any difference in the outcome of the employment decision. This is not what Title VII was intended to accomplish. It was not enacted to ban discriminatory feelings or expressions, by employers or anyone else. Instead, it requires that the employer "must do or fail to do something in regard to employment * * * *because of*" some discriminatory motive. 110 Cong. Rec. 7254 (1964) (emphasis added). Only insistence that a Title VII plaintiff establish the usual standard of causation, by proving that the employer would have reached a different decision "but for" discrimination, can ensure that the statute is not turned into a "thought control" bill. *Ibid.*; see U.S. Br. 9, 25.[14]

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[14] Amicus AFL-CIO argues (Br. 10-14) that causation in fact must be abandoned in individual disparate treatment cases such as Hopkins' because, otherwise, Title VII would leave it open to employers to maintain systemic employment practices that discriminate against women (even though no individual employment decision can be shown to have been caused by discrimination). But this concern is misplaced. Title VII provides ample remedies for eliminating such practices without a requirement of "but for" causation.

First, Section 703(a)(2) outlaws such practices by making it unlawful for an employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of" an impermissible reason. A sexually biased promotion *system* obviously would "tend" to limit employment opportunities by "segregating" and "classifying" employees on impermissible grounds; and an attack under Section 703(a)(2) would not have to depend on a showing that a particular woman actually would have been hired or promoted but for her sex.

Second, facially discriminatory policies may be actionable in class action disparate treatment cases brought under Section 703 (a)(1). Where, in such cases, the allegation is that the employer, rather than being guilty of a particular decision not to hire or promote on account of sex, is guilty of discriminating against a class in the terms, conditions, or privileges of employment, the case may be conceived of as the functional equivalent of a Section 703 (a)(2) case (although presumably at least one member of this class would have to show some specific injury in order to create Article III jurisdiction). (But of course Hopkins did not bring a class action; her suit alleged that *she* was not promoted "because of" her sex.)

Finally, the government may challenge such practices in "pattern-or-practice" cases brought under Section 707(a). If the government proves the existence of a pattern or practice, prospective relief may be appropriate, even though additional proceedings would be required to determine the scope of individual relief. *Teamsters* v. *United States*, 431 U.S. 324, 361 (1977).

B. Unable to make the required showing of causation, Hopkins has virtually abandoned her original contention that Price Waterhouse violated Section 703(a)(*1*) when it declined to make her a partner. Instead, she argues for the first time in her brief to this Court that she proved a violation of Section 703(a)(*2*). Resp. Br. 20-22; see also AFL-CIO Br. 11-13.

But it is much too late for Hopkins to claim that Price Waterhouse violated Section 703(a)(2) because random manifestations of sexual stereotyping made an appearance in the comments of some of her evaluators (none of them actual decisionmakers in her case). No such theory was tried by the district court, and no review of it was attempted by either the district court or the court of appeals. Hopkins' case was brought, tried, and appealed on the claim that the *particular* decision not to promote her at that time was made "because of" her sex and thus violated Section 703(a)(*1*) of Title VII. The distract court expressly found that Hopkins' evidence failed to prove "the substantial statistical disparity ordinarily required to show that a subjective evaluation process produces a discriminatory disparate impact" (Pet. App. 59a n.16). No serious and focused inquiry was ever made in this case as to whether stereotyping was such a *general* or *structural* aspect of Price Waterhouse's partnership system that it "classified" or "segregated" em-

ployees in violation of Section 703(a)(2). Under these circumstances, no violation of Section 703(a)(2) can be deemed to have been shown.

In any event, Hopkins' eleventh-hour theory confounds and confuses two different sorts of Title VII cases. Under her new approach, every Section 703(a)(1) violation automatically would violate Section 703(a)(2), leaving no independent scope for the former section at all. Section 703(a)(2)—whose principal function is to deal with cases of disparate impact, not disparate treatment [15] —is violated, not by individual, one-shot employment decisions, but by systemic employment practices that disfavor, or tend to disfavor, women. *Per contra, systemic* practices and classifications that disfavor women, but cannot be shown to have *caused* a particular employment decision, can violate Section 703(a)(2), but are not actionable in an individual disparate treatment case under Section 703(a)(1).

In fact, Hopkins' reliance on Section 703(a)(2) at this late hour is simply a desperate attempt to find shelter under a statutory provision that does not condition liability on proof of a causal link between a challenged employment policy and an individual employment decision—

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[15] Disparate impact cases "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on" women or minorities. *Teamsters*, 431 U.S. at 336 n.15. See also *Watson v. Fort Worth Bank & Trust Co.*, No. 86-6139 (June 29, 1988), slip op. 10 (Section 703(a)(2) prohibits the use of a "system of * * * decisionmaking" that has a disparate impact).

Plaintiffs alleging disparate impact need not prove that the challenged policy was the "but for" cause of any particular employment decision in order to establish liability. This is because it is the maintenance of a policy that has an unnecessarily disparate impact that violates Title VII. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-432 (1971). But Hopkins' case is *not* a disparate impact case. She is an individual plaintiff alleging disparate treatment. As such, she is not relieved of the duty of proving that her partnership bid was placed on hold "because of" intentional discrimination.

and thereby to head off the conclusion "that *all* Title VII disparate treatment cases should be resolved under the *McDonnell Douglas/Burdine* framework" (U.S. Br. 18) (emphasis in original), with its requirement that plaintiff prove that she was the victim of intentional discrimination. While it is true that the *McDonnell Douglas/Burdine* framework does not apply to Section 703(a)(2) claims, it is also true that Section 703(a)(2) has no relevance to Hopkins' case.

C. The final prong of respondent's attack on the requirement of causation depends on the rigid and artificial distinction she draws between the issues of liability and remedy under Title VII. More specifically, she argues (Br. 31-32) that the special emphasis on the requirement of causation in Section 706(g) of Title VII is rigidly limited to that section and its specific limitation of "make whole" remedies such as reinstatement and back pay. From this she proceeds to the conclusion (Br. 32-33) that "causation" is relevant *only* to the remedial phase of the case—(one where the cards have, of course, already been carefully stacked against the employer because of a shift in the burden of proof). Indeed, Congress's specification of the requirement of cause in Section 706(g) is used to support the negative inference that Congress was indifferent to the requirement of cause in Section 703(a)(1).

Respondent is wrong. Section 706(g) does not exist in a hermetically sealed universe, and its policies are not at all irrelevant to questions of liability. It is, of course, true that the requirement of "cause" specified in Section 706(g) does play an independent role in those cases where liability may be established without a showing of causation—for example, class actions brought under Section 703(a)(1), discriminatory "practices" cases brought under Section 703(a)(2), and pattern-or-practice cases brought by the government under Section 707(a). Section 706(g) assures that in such cases relief will be limited to a declaration or perhaps an injunction, and will not include reinstatement and back pay for persons who

were not in fact the victims of discrimination.[16] But the fact that Section 706(g) plays this independent role in cases where causation is not required to establish liability does not mean that the congressional purpose expresed in Section 706(g) is irrelevant to problems of liability. Still less does it support the negative-spin inference that Congress intended to dispense with requirements of causation in the liability aspect of all Title VII cases.

In fact, the legislative history of Section 706(g) establishes without doubt that the overriding purpose of the particular language specifying that certain forms of remedy are prohibited where the employer acts for "*any* reason *other* than" a prohibited reason was *to integrate the remedial provision with what was assumed to be the fundamental policy of the liability sections.* As Representative Celler said, "the purpose of the amendment is to specify cause." "[T]he court, for example, cannot find *any violation* of the act which is based on facts other" than discrimination. 110 Cong. Rec. 2567 (1964) (emphasis added). Representative Gill said that the Congress wished to "pinch down" orders under this act and that "we would limit orders under this act *to the purposes of this act.*" *Id.* at 2570 (emphasis added). These authoritative expressions are completely inconsistent with the notion that "cause" was to be deemed important *only* in connection with the secondary remedial aspects of the case (where its meaning would in addition be wholly diluted by respondent's contention that, in this remedial

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[16] See *Teamsters*, 431 U.S. at 359 (proof of discrimination against a class of persons can do no more than "ma[ke] out a prima facie case of discrimination against the individual class members"). It is revealing that, virtually without exception, the cases that Hopkins uses to illustrate the claim that the "cause" requirement of Section 706(g) is irrelevant to questions of liability under Section 703(a)(1) are decisions in class actions. See Resp. Br. 31-33. See also U.S. Br. 21-24 (citing class action precedents, and decisions from outside the Title VII area that we have shown to have no relevance to this case (Pet. Br. 33 n.14)).

phase, the employer must carry the burden of persuasion).

CONCLUSION

Respondent's strategy in this case is plain. Under her theory, Hopkins has the burden of persuasion, but need not establish causation—she carries her burden by showing that a discriminatory thought or comment was sufficiently "in the air" that it may have played an "undefined" role in an employment decision. (This is, functionally, no more than the equivalent of the *first* stage ("prima facie" case) of the *Burdine* framework. Indeed, respondent's theory of Title VII is simply an elaborate way to jettison from the law *Burdine*'s third stage—the requirement that plaintiff show that the valid reason demonstrated by the employer was not the "true" reason.) Having shown, on the basis of this flimsy threshold requirement, that defendant is a "wrongdoer" (Br. 33), respondent has set the stage for the next move—the shift to the employer of the burden of persuasion (indeed, by a "clear and convincing" showing) on the issue of remedy. The upshot is a stacking of the deck that would make it virtually impossible for an employer to establish that the "true" reason for its decision was not discrimination.

Hopkins now agrees with us that the court of appeals erred by requiring Price Waterhouse to bear the burden of persuasion at the liability stage of the case. The issue thus boils down to the *standard* that she must meet to show that the decision to postpone partnership in her case was "because of" her sex. As we demonstrated in our opening brief, and again here, adoption of any standard other than the traditional "but for" test is inconsistent with the language and purposes of Title VII. This being so, the *McDonnell Douglas/Burdine* framework, which exists only to facilitate inquiry into the plaintiff's ultimate burden of proving that she was "the victim of intentional discrimination," *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981), clearly applies in this individual disparate treatment

case; and the court of appeals' abandonment of that framework was plainly in error. Having failed to prove that she would have been made a partner in the absence of discrimination and that the valid reason shown by Price Waterhouse for its decision was not the "true reason," it follows that Hopkins has simply been unable to establish that she was in fact "the victim of intentional discrimination."

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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